

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of:

John Schmitz
J & M Towing Service Inc.
233 Winnebago Drive
Fond du Lac, Wisconsin 54935

PECFA Claim: # 54935-2446-33
Hearing: #97-122

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed August 18, 1997, under § 101.02 (6) (e) Wis. Stats., and §Comm/ILHR 47.53 Wis. Adm. Code, to review a decision by the Wisconsin Department of Commerce (Department), a hearing was commenced on January 12, 1999, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on August 27, 1999, and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department was correct in denying reimbursement of a portion of the appellant's claim, on the basis that the appellant did not comply with the competitive bidding requirements of ILHR 47.33 (now Comm 47.33).

There appeared in this matter the following persons:

PARTIES IN INTEREST:

John Schmitz
J& M Towing Service, Inc.
233 Winnebago Drive
Fond du Lac, Wisconsin 54935

By: Daryl W. Laatsch, Esq.
Attorney at Law
1727 Barton Avenue
West Bend, Wisconsin 53090

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kristiane Randal, Esq.

Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to § 560.02 (3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important or you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or

law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in §227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 3-28-00

Wm. Bruce Fox
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: 3/31/00,
Mailed By: Sue Budka

Resent 4/11/00
Sue Budka

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

IN THE MATTER OF: The claim for

MADISON HEARING OFFICE
1801 Aberg Ave., Suite A

reimbursement under the PECFA
Program by

P.O. Box 7975
Madison, WI 53707-7975
Telephone: (608) 242-4818
Fax: (608) 242-4813

John Schmitz
J & M Towing Service, Inc.

Hearing Number: 97-122
Re: PECFA Claim # 54935-2446-33

PROPOSED HEARING OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Terry W. Grosenheider, Executive Assistant of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:
Karen L. Godshall

DATED AND MAILED:
August 27, 1999

MAILED TO:

Appellant Agent or Attorney

Attorney Daryl W Laatsch, S.C.
1727 Barton Avenue
West Bend, WI 53090

John Schmitz
J & M Towing Service Inc.
233 Winnebago Drive
Fond du Lac, WI 54935

Department of Commerce

Kristiane Randal
Assistant Legal Counsel
P.O. Box 7838
Madison, WI 53707-7838

State of Wisconsin
DEPARTMENT OF COMMERCE

In the matter of the
Request for Reimbursement Pursuant

To the Provisions of the PECFA Program

Hearing Number 97-122

PECFA Claim Number 54935-2446-33

John Schmitz/J & M Towing Service, Inc., Appellant

vs.

Wisconsin Department of Commerce

A decision was issued on July 24, 1997, by a claims reviewer of the Petroleum Environmental Cleanup Act (PECFA) program staff, denying a portion of the reimbursement sought by the appellant, specifically portions relating to excess well installation costs, ineligible PCB testing costs, and certain laboratory fees. The appellant appealed from the denial of the laboratory costs, by an appeal filed in a timely manner on August 18, 1997.

The secretary of the Wisconsin Department of Commerce delegated administrative law judge Karen L. Godshall, of the Wisconsin Department of Workforce Development (previously the Department of Industry, Labor and Human Relations) to hear the appeal.

Pursuant to agreement of the parties at a telephone preheating conference, the hearing on the matter was set for January 12 and 13, 1999, at Madison, Wisconsin. The hearing was held as scheduled, with attorney Kristiane Randal representing the Department of Commerce, and attorney Daryl Laatsch presenting the appellant. Following the hearing, briefs were received from each party. The matter is now ripe for issuance of a proposed decision.

Based on the testimony taken at the January hearing, the exhibits received into evidence at that hearing, and the subsequent briefs of the parties, the state hearing officer now makes the following

PROPOSED FINDINGS OF FACTS

The claimant/appellant is the owner of a business located in Fond du Lac, Wisconsin. Beginning in calendar year 1993, and continuing through 1995, a variety of remediation activities were carried out at that business site, due to the discovery of petroleum contamination there. The bulk of that work was carried out at the direction of the claimant's PECFA consultant, Cooper Environmental & Engineering.

On May 15, 1996, the claimant/appellant submitted a claim for reimbursement to the PECFA program. The claim included requests for reimbursement of certain laboratory services provided by various vendors to the consultant, Cooper Environmental, amounting to \$6,755.50. Reimbursement for that amount was denied by the PECFA reviewer.

The above disputed amounts represent invoices from PAL Labs and from EnChem for work performed in 1993 through 1995.

Cooper Environmental had chosen the above vendors for its laboratory needs based upon an annual bidding process for each of the years in question. Cooper Environmental received at least three bids from competing vendors for each of those years. The bids varied as to format and as to the particular tests or services on which they were bidding, and were received over a several month period. Cooper Environmental initially selected Suburban Labs as the low-cost bidder for the first year of the bidding process. After that business ceased operation, testing was transferred to PAL. EnChem was selected as the annual provider for laboratory services in the next round of bidding.

ISSUE

The issue to be decided is whether the Department was correct in denying reimbursement of a portion of the appellant's claim, on the basis that the appellant did not comply with the competitive bidding requirements of ILHR 47.33 (now Comm 47.33).

RELEVANT ADMINISTRATIVE RULES

ILHR 47.33(l)(b), relating to the need for competitive bidding of commodity services used on PECFA sites, was first promulgated as an emergency rule, effective January 1, 1993. The relevant section of that emergency rule reads as follows:

- (b) Commodity purchases. 1. All commodity services which include but are not limited to soil borings, monitoring-well construction, laboratory analysis, excavation and trucking must be obtained through a competitive bid process. A minimum of 3 bids are required to be obtained and the lowest cost service provider must be selected.
2. Consulting firms may elect to bid laboratory services on a calendar year basis in order to obtain volume discounts and reduce the number of bids that must be completed for each remediation. In completing the competitive bid process, the consulting firm must obtain a minimum of 3 written bids. The lowest bid must be accepted. All discounts, rebates(sic) and savings must be reflected in the PECFA claim.
3. A responsible party may appeal to the department to obtain approval to select other than the lowest cost commodity service provider. The department may approve an appeal if it determines that the use of another service provider will further the goals of the program.

A permanent rule was later adopted, which was substantially similar to the above emergency rule, except for a limitation on commodity service providers participating in preparation of the bid documents in situations in which they were also bidders.

PROPOSED DISCUSSION

The issue of the adequacy of the commodity bid procedures in this matter is essentially two-fold, as the parties recognize in their briefs. First, did the appellant's consultant secure the requisite number of competitive annual bids; and second, did the appellant's consultant then choose the lowest-cost bidder for each of the years in question.

The appellant first argues that the procedures which the consultant utilized in securing and choosing among its laboratory service bidders should be found to be in compliance with the rule requirements because other claims, involving the same consultant and/or the same laboratory service providers, were not disallowed by the PECFA program reviewers. In support of that argument, the appellant has submitted a variety of claim decisions. The argument is not persuasive, for several reasons. First, the other claim materials are of a summary nature only, and do not provide sufficient detail to allow analysis of the bidding procedures. Second, the other claims are not necessarily comparable to the instant claim in terms of the applicable rules at the time of those actions. (Some of the claims relate to sites on which work was performed prior to the effective date of ILHR 47.) Finally, and most importantly, the other claims in question have little value as precedent, as they have not been subjected to the formal hearing and decision-making process. It is the burden of the appellant here, once the claim has been disallowed in whole or in part, to prove the department wrong in its disallowance. Whether other claims, which might have been appropriately disallowed, have in fact been paid is not the question before this decision-maker.

The appellant has also argued that it did not have sufficient information to allow solicitation of bids and comparison of bids in a manner acceptable to the program. This argument is not persuasive. The concept of competitive bidding requires certain minimums. The bidders must have a common basis for bidding, and there must be a reasonable basis for evaluating the bids which are received. While the PECFA program provided progressively more detailed information to PECFA consultants to use in soliciting and evaluating bids, the use of specific formats was not required. The appellant has not established that there was any misinformation provided by the program to the appellant or its consultant which would have caused them to reasonably believe that they would not be required to comply with the bidding requirements or to be able to document their compliance.

Without regard to the other accepted claims or to the reliance argument, the appellant must then establish that in this case, its consultant met the competitive bid requirements of ILHR 47.33 (now Comm 47.33).

The appellant and its consultant have failed to supply the solicitation letter or notes of any telephone contacts in which bids were sought. The individual responsible for soliciting such bids did not testify at the hearing. The testimony of the head of the consulting firm is admissible, but does not carry great weight, given that he had only minimal involvement in the actual bid process. He was unable to state, for example, what quantity of work (either in number of jobs or dollar volume) was offered as the basis of bidding. The bids which were received from the laboratory service providers were very disparate in the items on which bids were offered, and carry no indication of the volume of work which was anticipated in setting their bid prices. In one case, a cover letter from a laboratory service provider specifically notes that the prices may be used as either an annual bid or as an individualized project bid for any PECFA project, suggesting that the prices did not reflect any sort of annual or volume discount.

Even if it is assumed that the laboratory service providers were given complete and consistent information as to the amount of work on which they were bidding, and even if it is assumed that their bids were calculated on that volume basis, there are further problems in assessing whether the lowest-cost bidder was selected.

The program supplied a form to be used in evaluating the bids and submitting the bid documentation to the department (form 2B). The appellant and/or its consultant, although indicating on their summary sheet that they had submitted the form, did not do so. Admittedly, the use of that particular form is not required. Nonetheless, there must be some means available for the department (and any appellant decision-maker) to evaluate the choice of bidder. In this case, the appellant provided no alternate evaluation at the time of its claim. In a supporting letter from the appellant's attorney, which is an exhibit in this matter, an analysis was proposed using one unit test for each of four groups of analyses (GRO, DRO, PVOCS, and WI LUST VOCS), purporting to show that the chosen vendors were the lowest for that combination of four tests. However, the consultant's witness who testified at the hearing (and who had contributed to preparation of the above letter) stated that a "weighting" was done based on the frequency of the tests that were anticipated. The earlier correspondence shows no such weighting. Even at the time of hearing, the appellant and its consultant offered no computational analysis as to its decision-making.

At the hearing on this matter, and in the parties' briefs, there is a great deal of complaining and finger-pointing as to the lack of appropriate witnesses and documentation. In retrospect, the hearing record is less complete than it could and should have been, in the view of the hearing officer. It appears that neither party made substantial efforts to secure the testimony of individuals who might have been available to testify but who had moved to new employment since the matter began. However, since the burden of proving its case falls upon the appellant, its failure to provide appropriate evidence has the more serious consequences. The appellant has failed to establish by competent and persuasive evidence that it and its consultants complied with the requirements of ILHR 47.33 in its annual bidding procedures.

PROPOSED CONCLUSIONS OF LAW

The appellant has the burden of proving that the PECFA program's denial of the laboratory costs in question was in error and that the costs were eligible for reimbursement.

The appellant has not established that the laboratory service bids which it received and considered were competitive annual bids, nor has it established that it utilized a valid analysis in choosing the lowest-cost bidder or that the lowest-cost bidder was actually chosen in each of the years in question.

The appellant therefore has not met its burden in proving that reimbursement of the disputed laboratory costs is required.

PROPOSED DECISION

The department's decision of July 24, 1997, denying a portion of the appellant's claim for PECFA reimbursement on the basis that the appellant did not comply with the competitive bidding requirements of ILHR 47.33 (now Comm 47.33) is affirmed.

Mailed this 27th day of August, 1999.

By
Karen L. Godshall
State Hearing Officer